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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA

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6 JAMES E. HERMANSON,

Case No. 3:17-cv-00721-HDM-CBC

7 Petitioner,

8 v.

ORDER

9 ISIDRO BACA, et al.,

10 Respondents.

11 This counseled habeas matter comes before the court on  
12 Petitioner James E. Hermanson's Motion for a Stay and Abeyance  
13 (ECF No. 44). Respondents did not respond to this motion and the  
14 deadline to do so has expired.

15 Petitioner challenges his 2013 conviction in state court for  
16 sexual assault of a child under the age of 16. (ECF No. 21 at 2).  
17 On June 3, 2019, this Court granted in part Respondents' motion  
18 to dismiss the Second Amended Petition, concluding that Ground  
19 Three was unexhausted. (ECF No. 43). Petitioner now seeks a  
20 stay and abeyance so that he may exhaust that claim in state  
21 court.

22 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court  
23 placed limitations upon the discretion of the court to facilitate  
24 habeas petitioners' return to state court to exhaust claims. The  
25 *Rhines* Court stated:

26 [S]tay and abeyance should be available only in limited  
27 circumstances. Because granting a stay effectively  
28 excuses a petitioner's failure to present his claims  
first to the state courts, stay and abeyance is only

1 appropriate when the district court determines there  
2 was good cause for the petitioner's failure to exhaust  
3 his claims first in state court. Moreover, even if a  
4 petitioner had good cause for that failure, the  
5 district court would abuse its discretion if it were to  
6 grant him a stay when his unexhausted claims are  
plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An  
application for a writ of habeas corpus may be denied  
on the merits, notwithstanding the failure of the  
applicant to exhaust the remedies available in the  
courts of the State").

7 *Rhines*, 544 U.S. at 277. The Court went on to state that "it  
8 likely would be an abuse of discretion for a district court to  
9 deny a stay and to dismiss a mixed petition if the petitioner had  
10 good cause for his failure to exhaust, his unexhausted claims are  
11 potentially meritorious, and there is no indication that the  
12 petitioner engaged in intentionally dilatory litigation tactics."  
13 *Id.* at 278.

14 The Ninth Circuit has held that the application of an  
15 "extraordinary circumstances" standard does not comport with the  
16 "good cause" standard prescribed by *Rhines*. *Jackson v. Roe*, 425  
17 F.3d 654, 661-62 (9th Cir. 2005). This court has declined to  
18 prescribe the strictest possible standard for issuance of a stay.  
19 "[G]ood cause under *Rhines*, at least in this Circuit, should not  
20 be so strict a standard as to require a showing of some extreme  
21 and unusual event beyond the control of the defendant." *Riner v.*  
22 *Crawford*, 415 F. Supp. 2d 1207, 1210 (D. Nev. 2006). Thus, a  
23 petitioner's confusion over whether his petition would be timely  
24 filed constitutes good cause for the petitioner to file his  
25 unexhausted petition in federal court. *Id.* (citing *Pace v.*  
26 *DiGuglielmo*, 544 U.S. 408, 416-17 (2005)). Ineffective  
27 assistance of postconviction counsel can also constitute good  
28 cause. *Blake v. Baker*, 745 F.3d 977, 982-83 (9th Cir. 2014).

1       Petitioner argues that good cause exists because he was  
2 reasonably confused as to whether Ground Three had been  
3 exhausted. Given his multiple attempts to present this claim, or  
4 at least a similar claim, to the state court by filing a motion  
5 to correct illegal sentence, an appeal of the order denying that  
6 motion, and a writ of prohibition, the Court finds that  
7 Petitioner has established his reasonable confusion and good  
8 cause exists for his failure to exhaust in state court. The  
9 Court further finds that the unexhausted grounds are not "plainly  
10 meritless," and that Petitioner has not engaged in intentionally  
11 dilatory litigation tactics. Accordingly, the Court will grant  
12 Petitioner's unopposed motion for a stay and abeyance.

13       In accordance with the foregoing, Petitioner's unopposed  
14 Motion for Stay and Abeyance (ECF No. 44) is GRANTED.

15       It is further ordered that this action is STAYED pending  
16 exhaustion of the unexhausted claim in the second amended  
17 petition.

18       It is further ordered that the grant of a stay is  
19 conditioned upon Petitioner litigating his state postconviction  
20 petition or other appropriate proceeding in state court and  
21 returning to federal court to file a motion to reopen within  
22 forty-five (45) days of issuance of the remittitur by the Supreme  
23 Court of Nevada at the conclusion of the state court proceedings.

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It is further ordered that the clerk shall ADMINISTRATIVELY CLOSE this action, until such time as the court grants a motion to reopen the matter.

IT IS SO ORDERED.

DATED: this 8<sup>th</sup> day of August, 2019.

Howard D McKibben

HOWARD D. MCKIBBEN  
UNITED STATES DISTRICT JUDGE